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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

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No. 284

STANLEY SHEIKOWITZ,

Petitioner,

v.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO CERTIORARI

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent
Office & P.O. Address
261 Madison Avenue
New York, New York 10016
Tel. No. (212) MU 7-5850

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOHN J. O'GRADY
Assistant Attorney General
of Counsel

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Opinions below

The opinion of the New York Supreme Court, Appellate Division Third Department is reported at 57 AD 2d 1031 and is reproduced as Appendix B to the petition. The New York Court of Appeals denied leave to appeal to that Court on July 7, 1977. The Court of Appeals' order, not yet officially reported, is reproduced as "Appendix A" to the petition.

Jurisdiction

Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1257.

Question Presented

Whether, under all the facts adduced at a disciplinary hearing into the conduct of a professional licensee, the hearing panel's finding on conflicting evidence that petitioner made an illegal sale of drugs and was not entrapped by state or federal agents denies him due process under the 14th amendment. The New York State Courts have found that the finding of fact was based upon sufficient legal evidence.

Statement of the Case

Petitioner, a New York State licensed pharmacist, was found guilty in a disciplinary hearing before a State Administrative Agency of selling 990 diethylpropion hydrochloride tablets, a prescription-required drug without a prescription, to an agent of the United States Drug Enforcement Administration (New York Education Law §§ 6509 and 6510).

The hearing panel found that "on February 26, 1974 [petitioner] dispensed a bottle containing 990 Diethylpropion Hydrochloride tablets for the sum of $60, without first having received an authorized prescription from the purchaser." The panel also found, ". . . that the [petitioner] was not threatened or otherwise forced to sell the said Diethylpropion Hydrochloride, but admitted that he had dispensed and sold the aforementioned drug, although he knew and admitted that the said transaction was illegal."

The panel also ruled it immaterial whether the bottle of 990 Diethylpropion Hydrochloride tablets was dispensed and sold to Roger Wroobel or Gerald Graffam. The transaction constituted an illegal act in either case (the finding is reproduced as Appendix C to the petition).

In recommending a measure of discipline (a three month suspension of license) for the illegal sale, the panel disbelieved and rejected petitioner's claim that he had been entrapped into the sale by one Roger Wroobel (Appendix-C).

The only hint of entrapment in this case came from the mouth of the petitioner who fabricated the story in an attempt to avoid the consequences of his illegal conduct. In finding that petitioner was lying, the hearing panel believed the testimony of agent Graffam and Roger Wroobel that they were both in petitioner's store on February 26, 1974, when petitioner sold the drug to Graffam for $60.

Officer Piccininni of the Nassau County Police Department testified that he saw Graffam and Wroobel enter the store on that date and exit with the purchase. Obviously, petitioner was lying when he insisted he delivered the drugs to Wroobel and swore that Graffam was not in the store at all.

Contrary to the assertions in the petition for certiorari (p. 3) the police officer did not turn Wroobel or anyone else loose to prey on innocent persons. Actually, an informer advised the police officer that Wroobel offered to obtain drugs from a pharmacist for resale if he could find a buyer for them. The officers did not choose petitioner for investigation, but merely followed through on a lead presented to them. They initially thought that Wroobel would be the defendant. It was not until petitioner freely sold a prescription-required drug without prescription to agent Graffam in his pharmacy that the petitioner became a subject of the investigation.

Contrary to petitioner's assertion at p. 4 of his petition, respondent vigorously disputes the claim that "Wroobel refused to leave the drug store until petitioner yielded to his request". The hearing panel, based upon facts in the record, found exactly to the contrary. The panel "found that [petitioner] was not threatened or otherwise forced to sell" the drug illegally. They refused to accept petitioner's proffered excuse that he dispensed the drug with-

out prescription "as a result of being annoyed by the frequent presence in his pharmacy of Roger Wroobel, who had requested the drug."

The Panel believed Wroobel when he testified that petitioner agreed to sell him 2,000 Librium after about 15 minutes rather than the hour and a half claimed by petitioner. That testimony is further confirmed by the fact that Wroobel, on February 26, 1974, was able, within 15 minutes, to return to petitioner's store, reject the offer of 2,000 Librium and arrange a sale of 990 Diethylproprion Hydrochloride tablets and telephone the officers that a sale of a stronger drug was arranged.

Petitioner's claim of entrapment was rejected by the Panel as a finding of fact. Nowhere did the Panel state that the defense of entrapment was rejected as a matter of law.

The Appellate Courts of New York State have ruled that a finding of fact made by an administrative agency will not be disturbed by the courts unless that finding is so devoid of factual basis as to be arbitrary, unreasonable and hence an abuse of discretion. *Matter of Pell* v. *Board of Education,* 34 N.Y. 2d 222 (1974); *Hotel Ass'n of New York City Inc.* v. *Weaver,* 3 N.Y. 2d 206, 213 (1957).

The hearing panel must pass upon the credibility of witnesses and base its inferences on what it accepts as the truth; *Matter of Collins* v. *Codd,* 38 NY 2d 269 (1976); *Matter of Avon Bar & Grill* v. *O'Connell,* 301 N.Y. 150, 153 (1950); *Matter of Sternfels* v. *Board of Regents,* 20 AD 2d 840 (3rd Dept., 1964) lv. to app. den. 15 N.Y. 2d 488 (1965), cert. den. 382 U.S. 901 (1965).

In this case the Court started from the premise that a finding of fact contrary to petitioner's assertions was made by the hearing panel based upon substantial legal evidence. Petitioner therefore fails to establish any constitutional issue of entrapment.

Reasons for Denying the Writ

Petitioner has failed to raise any question of general importance warranting the exercise of the Court's certiorari jurisdiction, S. Ct. Rules, Rule 19 (1) (b).

The record in this case consists of a full evidentiary hearing followed by a factual determination contrary to petitioner's allegation of "entrapment". There is no factual basis for petitioner's allegation that an administrative agency refused to recognize the defense and "proof" of entrapment. The administrative agency clearly ruled that petitioner did not sustain his claim of entrapment on the facts.

CONCLUSION

Certiorari should be denied.

Dated: New York, New York
September 27, 1977

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

JOHN J. O'GRADY
Assistant Attorney General
of Counsel